In the Court of Appeals of the State of Alaska

Marino Dan Ieremia, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13216** **Order** Objection to Cost of Counsel Judgment Date of Order: **November 23, 2020**

Trial Court Case No. **3AN-17-07836CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges

Marino Dan Ieremia pleaded guilty to first-degree indecent exposure. At his sentencing hearing, Ieremia objected to the imposition of two probation conditions that authorized the use of plethysmograph testing. The prosecutor argued that the conditions were appropriate, and the court imposed these conditions over Ieremia's objection.

Ieremia's attorney then appealed the two provisions that authorized the use of plethysmograph testing during his term of probation. The State conceded that the provisions authorizing this testing were subject to special scrutiny and that a remand was required for the trial court to reconsider the conditions. In a summary disposition, we agreed, and we remanded Ieremia's case to the superior court for reconsideration of the contested provisions, applying special scrutiny analysis.

On remand, the prosecutor (a different prosecutor than the attorney who appeared on behalf of the State at Ieremia's original sentencing) filed a notice informing the trial court that the State did not object to deleting the challenged plethysmograph conditions and would not be pursuing them.

That same day, the Clerk of the Appellate Courts issued a notice of intent to enter judgment under Alaska Appellate Rule 209(b) for the cost of Ieremia's court-appointed appellate attorney. Under Appellate Rule 209(b)(5), at the conclusion of a direct appeal in which a criminal defendant is represented by court-appointed counsel, the Clerk of the Appellate Courts is directed "to enter judgment against the defendant for the cost of appointed counsel," according to a schedule set out in subsection (b)(6), "unless the defendant's conviction was reversed by the appellate court." Because Ieremia's conviction was not reversed (indeed, because he raised only sentencing issues, his conviction was not at issue), the clerk's office notified Ieremia that it intended to enter judgment for $500 — the cost for a felony sentence appeal, according to the Rule 209(b)(6) schedule.

Ieremia's attorney filed a motion to waive the cost-of-counsel fee or, in the alternative, to reduce the fee to $100. Ieremia's attorney noted the limited nature of Ieremia's appeal and the abbreviated nature of his briefing, and the fact that the issues ultimately resolved in his favor. He also argued that the fact that the appeal "was resolved through briefing rather than a motion for summary judgment appears to be based on a lack of coordination between defense counsel and the various representatives of the State at the trial and appellate levels and not any genuine dispute between the parties' legal positions." The State opposed Ieremia's motion to waive the fee, arguing that Ieremia's original objection to the probation conditions in the trial court was untimely and had resulted in unnecessary litigation.

As a general matter, when an appeal is resolved without substantive briefing, this Court does not impose a cost-of-counsel fee under Appellate Rule 209(b).

See, e.g., *Barraclough v. State*, No. 0126 Summary Disposition (Alaska App. Apr. 29, 2020) (unpublished). But when an attorney has filed a brief and an appeal is litigated in the normal course, the court does not reduce the cost-of-counsel fee in proportion to the number of successful claims, unless all of a defendant's convictions have been reversed. *See Cunningham v. State*, File No. A-11731 (Order dated June 1, 2018).

Here, Ieremia's attorney filed an opening brief, and typically, we would affirm the decision by the Clerk of the Appellate Courts to impose the standard cost-of-counsel fee. But the circumstances of this case are unusual. At his sentencing hearing, Ieremia cited specific case law in support of the notion that a plethysmograph condition is subject to special scrutiny. (In particular, Ieremia cited *Ranstead v. State*, 2016 WL 2944797, at *8 (Alaska App. May 18, 2016) (unpublished), *overruled on other grounds*, *State v. Ranstead*, 421 P.3d 15 (Alaska 2018), and *United States v. Weber*, 451 F.3d 552, 554, 568-69 (9th Cir. 2006).) The prosecutor argued that the use of plethysmograph testing was appropriate based on Ieremia's conduct — and that the treatment provider was in the best position to determine what testing was necessary.

On appeal, the State acknowledged that the plethysmograph provisions were subject to special scrutiny but argued that the timing of Ieremia's objection in the trial court deprived the State of the opportunity to present evidence in support of the condition. But the State never objected in the trial court to late notice, and it has become clear on remand that the State does not intend to pursue the conditions that Ieremia objected to and appealed. This appears to be the type of case that could have resolved short of briefing, if all of the relevant parties had conversed prior to briefing. We note that, each time we have considered the use of plethysmograph testing as a condition of

probation, we have either vacated the condition or remanded for application of special scrutiny.[1]

We therefore exercise our authority to reduce the cost-of-counsel fee to $100. *See* Alaska Appellate Rule 521 (noting that the Appellate Rules "may be relaxed or dispensed with by the appellate courts where a strict adherence to them will work surprise or injustice").

Entered at the direction of the Court.

Clerk of the Appellate Courts

Carly Williams, Deputy Clerk

cc: Court of Appeals Judges
Distribution:

Email:
Bordon, Tristan, Public Defender
Chleborad, Terisia K.

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[1] *See, e.g.*, *Gardner v. State*, 2018 WL 6418086, at *4 (Alaska App. Dec. 5, 2018) (unpublished); *Luke v. State*, 2018 WL 4490908, at *4 (Alaska App. Sept. 19, 2018) (unpublished); *Daley v. State*, 2018 WL 4144978, at *1 (Alaska App. Aug. 29, 2018) (unpublished); *Giddings v. State*, 2018 WL 3301624, at *4-5 (Alaska App. July 5, 2018) (unpublished); *Kon v. State*, 2018 WL 480454, at *5 (Alaska App. Jan. 17, 2018) (unpublished); *Ranstead*, 2016 WL 2944797, at *8.